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No. 79-2077

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NEW YORK WATER SERVICE CORP.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI

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Introductory Statement

Petitioner submits this reply brief in support of its Petition for Certiorari in order to clarify that portion of its argument which it believes respondent has misapprehended.

As our petition demonstrates, U&I's right to use its tax loss as an offset—a right created by Congress for the benefit of money-losing entities—is a legitimate property right of U&I. For a state to confiscate this property violates the Supremacy Clause and the Fourteenth Amendment. Contrary to respondent's statement at page 5 of its Brief in Opposition, this issue was not addressed by the Court in *FPC* v. *United Gas,* 386 U.S. 237 (1967).

In view of both its constitutional significance and its practical import, this Court should address this issue here and should accordingly grant our Petition for Certiorari.

Argument

Respondent's brief did not come to grips with the merits of the issues presented.

As if to refute our argument that *United Gas* should be overruled or limited to its narrow statutory holding, respondent simply refers this Court to that case. Then, as if further to justify its position, the Public Service Commission argues that it followed its own precedent. (Respondent's Brief in Opposition, p. 9)

Respondent, to this day, has not explained how it is rational to shift the benefit resulting from a tax loss from the consolidated group that has suffered the loss to the customers of the profitable member of that group. No rational defense of the holding below is possible.

This Court has made it clear that "property" within the meaning of the Fifth or Fourteenth Amendment is so designated by "existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Petitioner's right to use a tax loss as an offset was created by Congress: the consolidated tax return was designed by Congress to benefit the affiliated group that has suffered losses, not the customers of the subsidiary that made the profits. Thus, New York State, through its Public Service Commission, cannot:

(a) violate the Supremacy Clause by frustrating the intent of Congress, and

(b) deprive petitioner of a statutorily created property right in violation of the Fourteenth Amendment.

Contrary to respondent's contention (Brief in Opposition, pp. 5-7) this Court in *United Gas* did not even implicitly consider the FPC's ratemaking decision in a constitutional context. The *United Gas* decision was confined to the issue of whether the Commission had exceeded its authority under the National Gas Act. *Id.* at 238, 245, 246. The Court held that it had not. No action by a state was involved in that case; just as Congress can confer a property entitlement in the right to use a tax loss as an offset, Congress can confer broad rate-making powers on the FPC not to treat the regulated entity as if it had filed a separate tax return. *United Gas, supra* at 245-6. *Cf., Arnett* v. *Kennedy,* 416 U.S. 134 (1974) (statutorily created property interest can be conditioned by accompanying procedural limitations). But this case involves action by a state. And while Congress may have authorized the FPC to ignore the consolidated tax return in fixing rates (the Court in United having necessarily held that thus the National Gas Act modifies the Internal Revenue Code to that extent), Congress has never delegated similar power to state ratemaking authorities. The attempt of the PSC in this case to arrogate to itself such power to confiscate a benefit specifically created by Congress is impermissible. *Cf., Hisquierdo* v. *Hisquierdo,* 439 U.S. 572 (1979) (federal benefits may not be shifted to unintended beneficiary by state law).

Conclusion

For the above reasons, and for the reasons stated in our Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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